United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1143

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1143

UNITED STATES OF AMERICA,
Appellee,

—v.—

CHARLES D. ERB and FRANKLIN S. DEBOER,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Charles D. Erb and Franklin S. DeBoer appeal from judgments of conviction entered on March 11, 1976, in the United States District Court for the Southern District of New York, after a two week trial before the Honorable Charles L. Brieant, Jr., United States District Judge, and a jury.

Indictment 74 Cr. 818, filed August 19, 1974, charged the defendants Erb and DeBoer with four counts of filing false registration statements with the United States Securities and Exchange Commission ("SEC") in connection with the public offering of the common stock of Xprint Corporation ("Xprint") in violation of Title 15, United States Code, Section 77x and Title 18, United States Code, Section 2; four counts of causing the use of the mails in furtherance of a scheme to defraud the SEC, the National Association of Securities Dealers ("NASD")

and the prospective purchasers of the common stock of Xprint, in violation of Title 18, United States Code, Sections 1341 and 2; four counts of causing the use of the mails to distribute a prospectus for the public offering of Xprint common stock which prospectus did not disclose the true extent of the compensation paid to the underwriter in violation of Title 15, United States Code, Sections 77i(b) and 77j and Title 18, United States Code, Section 2; and one count of conspiracy in violation of Title 18, United States Code, Section 371. The indictment also charged the defendant DeBoer with three counts of causing the making and use of a false document in a matter within the jurisdiction of the SEC in violation of Title 18, United States Code, Sections 1001 and 2.

Trial commenced on April 21, 1975 and ended on May 2, 1975, when the jury found the defendant Erb guilty on Counts Two through Five, Ten and Twelve through Sixteen and the defendant DeBoer guilty on Count Two.*

On March 11, 1976, Judge Brieant sentenced Erb to concurrent terms of 18 months' imprisonment and sentenced DeBoer to five months' imprisonment and a fine of $5,000. The defendants are at liberty pending this appeal.

Statement of Facts

The Government's Case

In April, 1969, the defendants Charles D. Erb and Franklin S. DeBoer, together with their unindicted accomplice, George VanAken, were partners in the now-

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* The court dismissed Counts One (conspiracy), Nine and Eleven (mail fraud) at the close of the Government's case. The defendant DeBoer was acquitted on all remaining counts.

defunct New York Stock Exchange member firm, Baerwald & DeBoer (Tr. 57-59).* From April through September, 1969, the defendant DeBoer was the managing partner (Tr. 94). DeBoer left the firm on October 1 and the defendant Erb became managing partner (Tr. 167).

During April, 1969, Erb and Van Aken concluded certain agreements with Xprint Corporation ("Xprint") whereby Erb and Van Aken agreed to make a private placement of Xprint's common stock and to guarantee certain indebtedness of Xprint, in return for which Xprint agreed to sell unregistered shares of its common stock to Erb and Van Aken at substantially discounted prices (GX 101).

Shortly after the date of the private placement agreement, Baerwald & DeBoer and Xprint executed a "Memorandum of Intent" expressing an agreement in principle for Baerwald & DeBoer to become the underwriter for a "best efforts" public offering of Xprint common stock (GX 102).

On April 22, 1969, Erb and Van Aken met with DeBoer in the latter's office at Baerwald & DeBoer, 70 Wall Street, New York City (Tr. 72). At the meeting, DeBoer agreed to purchase 5,000 shares of Xprint stock in the private placement for two dollars per share with the agreement that one-half of his purchase would be registered and sold for seven or eight dollars per share in the public offering which Baerwald & DeBoer had already agreed to underwrite (Tr. 73). On the understanding that he "could get more than his investment

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* References to the trial transcript are in the form "Tr.—"; to Government Exhibits in the form "GX —"; to defense exhibits in the form "DX —"; to Appellant's Appendix in the form "App. —"; to Appellant's Brief in the form "App. Br. —".

out the first shot go round" (Tr. 73), DeBoer gave Van Aken his personal check payable to Xprint for $10,000 (Tr. 74; GX 103).

When he gave Van Aken the check, DeBoer instructed Erb and Van Aken that, because they were all partners in Baerwald & DeBoer, there would be a problem with having the low-priced Xprint stock in their own names (Tr. 74). DeBoer explained that the problem would be one of excessive underwriters' compensation for the proposed public offering that "wouldn't be allowed by the SEC or the NASD" (Tr. 75). DeBoer therefore told Erb and Van Aken that he wanted his stock put in the name of James Lovelett, his nominee (Tr. 74), whom DeBoer had previously used to disguise his interest in various securities transactions (Tr. 86).

After the meeting with DeBoer, Erb and Van Aken met in their own office where Van Aken told Erb that he intended to use a friend, Don Sedgwick as a nominee for his Xprint stock. Erb told Van Aken that he would use a customer, Dr. Scott Skillern, as his nominee. Both agreed that they would allow their nominees to keep approximately one-third of the stock (Tr. 88-89).

In April, 1969, the defendant Erb telephoned Dr. Scott Skillern, a dermatologist who lived and practiced in South Bend, Indiana (Tr. 453; GX 307A).* Erb asked Skillern whether he would be willing to have 50,000 shares of Xprint stock in his name with the "gentlemanly understanding" that Skillern actually own 11,000 shares and Erb would own the remainder (Tr. 470). Dr. Skillern agreed and sent Erb a check for $1,700 (Tr. 471; GX 301).

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* Although he lived and practiced in South Bend, Indiana, Dr. Skillern, at Erb's suggestion, maintained an address at Van Aken's New York City apartment "to avoid the Blue Sky law" (Tr. 461-62; GX 307).

On May 12, 1969,* Erb, Van Aken, Earl Deimund, President of Xprint, Otto Knapp, Vice-President of Xprint, Paul DeCoster, Xprint's attorney, and Conrad Schmitt, an investor, met to complete arrangements for financing Xprint (Tr. 547). DeCoster explained to Erb and Van Aken that, because Baerwald & DeBoer, of which they were partners, was to be the underwriter for the Xprint public offering, NASD rules regarding underwriters' compensation prohibited Erb and Van Aken from owning the stock that Xprint had previously agreed to sell to them for nominal consideration (Tr. 545-49). The parties agreed that Erb and Van Aken could "designate" other persons to be the owners of the Xprint stock they were to have purchased in their own names (Tr. 549).

During June, 1969, Erb and Van Aken individually informed DeCoster by telephone that their "designees" would be Dr. Scott Skillern and Donald Sedgwick, respectively (Tr. 90, 550).

In early May, 1969, Van Aken received a note in DeBoer's handwriting inquiring "Van Aken, where is my stock that I paid $10,000 for?" (Tr. 90-91; GX 104).

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* Three witnesses testified about this meeting. Each agreed as to the substance, but each differed on details of time, place and persons present. Van Aken placed the meeting in the first week of May at the office of Baerwald & DeBoer with himself, Erb, Deimund and DeCoster present (Tr. 89-90). Deimund placed the meeting in April at Conrad Schmitt's office with himself, DeCoster, Schmitt, Van Aken and Erb present (Tr. 412-13). Deimund testified that he was having "reasonable difficulty" recalling specific conversations and the identity of individuals present at conferences (Tr. 432-33). DeCoster testified from his diary entries that the meeting took place on May 12, 1969 in Conrad Schmitt's office. His diary did not disclose the individuals present, but DeCoster identified those present as himself, Deimund, Otto Knapp, Conrad Schmitt, Van Aken and Erb. DeCoster admitted that he was not as certain of Erb's presence as he was of the others' (Tr. 545-46).

Van Aken told DeBoer that the stock had not yet been issued and offered to take care of it for him. DeBoer told Van Aken "Fine, why don't you take care of it for me, then?" (Tr. 92).

In early July, 1969, formal "investment letters" to be signed by Lovelett and Skillern were received at Baerwald & DeBoer. Van Aken brought the Lovelett letter to DeBoer who returned it to Van Aken bearing a signature purporting to be Lovelett's (Tr. 92-3; GX 114). Erb directed his secretary, Barbara Caputo, to send Skillern's letter to him for his signature, and Skillern signed and returned the letter to Xprint (Tr. 472-77; GX 305A; DX X).

On August 20, 1969, the registration statement on Form S-2 was filed with the SEC by Xprint falsely listing James Lovelett, DeBoer's nominee, as a selling shareholder and Scott Skillern as the owner of 50,000 unregistered shares. The registration statement was also false in failing to disclose the true extent of the underwriter's compensation resulting from the ownership of low-priced stock by DeBoer, Erb and Van Aken (GX 2).*

Shortly after the filing of the registration statement, Robert E. Fischer, attorney for Baerwald & DeBoer, advised Van Aken that the NASD had certain questions about the identity of various investors and their relationship to Baerwald & DeBoer, the underwriter. Those investors included Lovelett, Sedgwick and Skillern, who were actually the nominees of the three partners of Baerwald & DeBoer (Tr. 121-23; GX 107). This inquiry by the NASD led to a series of letters and phone calls during September and October, 1969, throughout which the defendant Erb falsely assured his own attorney and the at-

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* Amendments to the original registration statement were filed on December 3, 12 and 19, 1969, containing the same falsehoods (GX 3, 4, 5).

torney for Xprint that Lovelett, Sedgwick and Skillern were legitimate investors in their own right. These false assurances caused Robert Fischer, attorney for Baerwald & DeBoer, to mail letters to the NASD confirming the initial falsehoods in the registration statement (Tr. 123-30, 552-55, 582-88; GX 9, 10, 11, 12, 107, 108).

In about mid-September, 1969, in DeBoer's office, DeBoer told Van Aken that he had been closely questioned by the New York Stock Exchange on his handling of the James Lovelett account and that his concern about incriminating himself under questioning by the Exchange might cause him to leave the firm. DeBoer resigned from Baerwald & DeBoer on October 1, 1969 (Tr. 166-67).

After DeBoer left the firm, a series of requests for letters to be signed by Lovelett and filed with the SEC was received at Baerwald & DeBoer by Van Aken. In every instance, one each in October, November and December, 1969, Van Aken telephoned DeBoer and advised DeBoer that a letter signed by Lovelett was needed to be filed with the SEC in connection with the registration of Xprint stock. DeBoer instructed Van Aken to take the documents to his former secretary, Ruth Haraldsen, whom DeBoer would direct to sign Lovelett's name. Haraldsen signed the letters in Lovelett's name and gave them to Van Aken (Tr. 133-42; GX 109).

On or about October 18, 1969, Dr. Skillern telephoned Erb and asked whether he could purchase additional unregistered Xprint stock. Erb agreed to sell Skillern an additional 9,000 shares for $2,000, bringing Skillern's total actual ownership of Xprint stock to 20,000 shares (Tr. 478-79; GX 302, 303).

Shortly after Skillern's second purchase of unregistered Xprint stock, Skillern began taping his phone con-

versations with Erb with Erb's knowledge and consent (Tr. 485-87). Edited versions of the conversations of October 28, November 22 and December 11, 1969, were played to the jury (GX 321, 323; App. 31-54). The substance of these conversations demonstrated that Skillern owned only 20,000 shares of Xprint stock and not the 50,000 issued in Skillern's name and set forth in the registration statement as belonging to Skillern. The conversations also disclosed the overall nature of the relationship between Erb and Skillern, including Erb's plan to continue to use Skillern as a nominee both to hide his own interest in future transactions and to take advantage of approximately $250,000 in losses sustained by Skillern for Erb's tax benefit.

The Xprint public offering, an all-or-none, best efforts offering, was never completely sold to the public and the offering was terminated (GX 116). Despite the fact that the offering had not been sold, Erb nevertheless commenced making a public trading market for the stock at prices in excess of the public offering price (Tr. 618-21).* Among the purchasers of Xprint stock in the "aftermarket" was the defendant DeBoer (GX 111).

The Defense Case

Neither defendant testified or called any witnesses. The defendant DeBoer introduced by stipulation the opinion of a United States Postal Service handwriting expert that DeBoer had not signed James Lovelett's name on the investment letter to Xprint (Tr. 801-2; GX 114) and the opinion of an FBI handwriting expert that he was unable to determine whether Ruth Haraldsen had signed James Lovelett's name on the three letters filed with the SEC bearing a forged signature of James Lovelett (GX 109). DeBoer also introduced his passport (DX JJ).

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* These transactions, under the circumstances, constituted a manipulative device in violation of SEC Rule 10b-6.

ARGUMENT

POINT I

The evidence was more than sufficient for the jury to conclude that the defendant DeBoer aided and abetted the filing of a false registration statement.

DeBoer argues that the Government's proof at trial was insufficient in that it failed to link DeBoer directly to the filing of the Xprint registration statement on August 20, 1969, which was the basis of his conviction. DeBoer concedes that there was sufficient evidence to demonstrate that James Lovelett was DeBoer's nominee and that the registration statement was false at least insofar as it lised James Lovelett as a selling shareholder.* He argues that because he did not directly participate in the preparation of the statement, did not sign it and did not file it, he may not be held responsible for it. This argument is entirely without merit.

DeBoer's argument totally ignores the substance of the April 22, 1969, meeting among DeBoer, Erb and Van Aken (Tr. 73-77). At that meeting, Erb and Van Aken offered DeBoer the opportunity to purchase unregistered shares of Xprint stock at the private offering price of two dollars per share. DeBoer accepted the offer only after being assured by his partners that Baerwald & DeBoer had already agreed to underwrite a public offering of Xprint stock at seven or eight dollars per share and that one-half of DeBoer's purchase would be

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* Lovelett testified that apart from a single purchase and sale, he had no knowledge of or interest in any securities transactions in his name, never even heard of Xprint Corporation and did not sign any of the letters that purportedly bore his signature (Tr. 317-48).

registered and sold in the initial public offering, allowing DeBoer to realize more than his initial investment on "the first shot go around" (Tr. 73). DeBoer, as the managing partner of the firm, certainly knew that any public offering would inevitably require that a registration statement be filed with the SEC and that such a filing was an essential part of his plan to realize a profit.

DeBoer's statements at the meeting virtually insured that the registration statement that he knew would be filed would be false. It was DeBoer who explained to the others that, as partners of the underwriter, they could not have stock in their own names without running afoul of the underwriters' compensation rules of the NASD and the SEC. It was DeBoer who instructed his partners that his stock should be issued in the name of James Lovelett, his nominee, in order to avoid disclosing his ownership in the registration statement. DeBoer, thus, was the architect of the entire scheme that resulted in the false filing on August 20, 1969. By his actions on April 22, it was DeBoer who "caused" the false filing just as much as if he had personally prepared and filed the registration statement. This evidence itself was thus more than sufficient to demonstrate that DeBoer aided and abetted the false statement. Title 18, United States Code, Section 2(b); *United States* v. *Wolfson*, 437 F.2d 862, 878 (2d Cir. 1970). As the Seventh Circuit stated in *United States* v. *Leggett*, 269 F.2d 35, 37 (7th Cir. 1959), "Cause means 'to bring about; to bring into existence'. It 'is a word of very broad import' and 'is used in [18 U.S.C.A. § 2(b)] in it's well-known sense of bringing about'." (Citations omitted).

DeBoer's argument also ignores the evidence of his subsequent participation in the crime.* In May, after

* This evidence, of course, must be viewed in the light most favorable to the Government. *United States* v. *Castellana*, 349 F.2d 264, 267 (2d Cir. 1965), *cert. denied*, 383 U.S. 928 (1966).

DeBoer inquired about what had happened to his stock, he, in effect, appointed his accomplice Van Aken his agent for purposes of the Xprint stock transaction (Tr. 92), and DeBoer is thus responsible for Van Aken's subsequent actions relating to registering the Xprint stock for sale to the public.

In addition, DeBoer continued his participation after the initial registration statement was filed, clearly demonstrating his knowledge that a registration statement had been filed and that it falsely listed James Lovelett as a selling shareholder. When it became necessary in October, November and December, 1969, for letters over Lovelett's signature to be filed with the SEC, Van Aken informed DeBoer of the need for such letters and DeBoer thereupon instructed Van Aken to bring the letters to DeBoer's secretary who ultimately signed Lovelett's name to them (Tr. 133-141; GX 109). When viewed in this context, DeBoer's own acts were more than sufficient to demonstrate that he participated in the false filing and sought to make it succeed. *United States* v. *Scandifia*, 390 F.2d 244, 248-50 (2d Cir. 1968); *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938).

DeBoer also ignores the undisputed fact that, when the initial registration statement was filed, he was the managing partner of the firm and, as such, responsible for all the activities of the firm and, of course, stood to gain personally if the registration and sale of the stock were successful. In this regard, DeBoer misconstrues the decision in *United States* v. *Koenig*, 388 F. Supp. 670 (S.D.N.Y. 1974). In that case, all defendants were acquitted by the court upon a finding that no material false statements were made and no conspiracy to file false statements had been proved. Despite the defendant Krantz' lack of substantive connection with any filings (he had resigned from the board of directors when the

documents in question were filed), he could have been convicted as a conspirator or aider and abettor had the false statements been proved.

DeBoer's case is inapposite to *Koenig* and is more closely analogous to *United States* v. *Wolfson*, *supra*, where this Court held that the chief executive could not escape criminal liability for false filings by delegating responsibility for the documents to a subordinate. It is well settled that a defendant need not have actually prepared nor even signed false documents to be criminally liable. *See United States* v. *Escow*, 422 F.2d 1060, 1065-69 (2d Cir.), *cert. denied*, 398 U.S. 959 (1970); *United States* v. *Merkee*, 425 F.2d 1043, 1046 (9th Cir.), *cert. denied*, 400 U.S. 847 (1970); *United States* v. *Berger*, 325 F. Supp. 1297, 1303 (S.D.N.Y. 1971), *aff'd*, 456 F.2d 1349 (2d Cir.), *cert. denied*, 409 U.S. 892 (1972).

POINT II

The applicable period of limitations as to the defendant DeBoer did not expire prior to the filing of the indictment.

DeBoer argues that, because all of his acts of aiding and abetting took place prior to August 19, 1969, the five year period of limitations expired as to him before the filing of the indictment on August 19, 1974. This novel argument, which focuses not on the commission of the crime but rather on DeBoer's participation in it, ignores a significant portion of the Government's evidence and is utterly unsupported by the relevant case law.

As a factual matter, DeBoer's claim that his personal involvement ended more than five years prior to the indictment is erroneous, since the Government's proof at trial clearly demonstrated that DeBoer's direct personal par-

ticipation in the crime for which he was convicted continued at least until December 11, 1969, the date of the third and last forged Lovelett letter to the SEC (GX 109). On this basis alone, it is clear that the five year period of limitations had not run prior to the filing of the indictment on August 19, 1974.

More significantly, however, DeBoer's argument is based on a fundamental misstatement of the applicable law. The period of limitation begins to run only "when the crime is complete." *Pendergast* v. *United States*, 317 U.S. 412, 418 (1943); *Toussie* v. *United States*, 397 U.S. 112, 115 (1970). DeBoer's argument depends on the erroneous proposition that aiding and abetting is a separate crime and is somehow "complete" when the aider and abettor ends his participation. As this Court has noted, however, Title 18, United States Code, Section 2, "does not define a crime; . . . there can be no violation of [Section 2] alone; an indictment under that section must be accompanied by an indictment for a substantive offense." *United States* v. *Campbell*, 426 F.2d 547, 553 (2d Cir. 1970).

The substantive offense which DeBoer was convicted of aiding and abetting, making a false statement in a registration statement filed with the SEC, by the terms of the statute, Title 15, United States Code, Section 77x, could not be complete until the registration statement was "filed" on August 20, 1969, a date within five years of the filing of the indictment. Because proof of the commission of the substantive offense is essential in the prosecution of an aider and abettor, *United States* v. *Cades*, 495, F.2d 1166 (3d Cir. 1974), DeBoer could not be prosecuted until the registration statement was filed. "The offense, not the persons involved, determines the applicability of the . . . period of limitation." *United States* v. *Campbell*, *supra*. Thus, the limitation period did not

begin to run until the completion of the crime on August 20, 1969.*

Because the indictment was filed within five years of the date of the filing of the registration statement, which was the criminal act upon which Count Two was based, the prosecution of DeBoer was not time-barred.

POINT III

The trial court's denial of a hearing on the issue of whether the Government suppressed evidence favorable to the defendant Erb was correct; no material evidence was suppressed.

Defendant Erb argues that the trial judge erred in denying in a memorandum opinion (App. 81-102), without a hearing, his motion for a new trial based on alleged suppression of material evidence favorable to him. Because it was evident from the record before the court that there was no suppression, and further that the evi-

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* The incorrectness of DeBoer's legal contention follows *a fortiori* from this Court's rulings on the computation of statutes of limitation with respect to charges of conspiracy. In *United States* v. *Borelli*, 336 F.2d 276, 385 (2d Cir. 1964), *cert. denied sub nom. Lynch* v. *United States*, 379 U.S. 960 (1965), this Court held that the commission of the last overt act in a conspiracy—which need have been committed by only one conspirator, *United States* v. *Rabinowich*, 238 U.S. 78, 86 (1915)—commences the limitation period. In particular, the Court rejected the contention that the period commenced with the "cessation of activity" of a defendant. This focus on the time of commission of the *crime*, rather than on the activity of a defendant, is even more significant when applied to a conviction for aiding and abetting. While the crime of conspiracy is a continuing crime existing both before and after the "cessation of activity" of a particular conspirator, an aider and abettor does not even commit a crime until the commission of the final act by his principal, which in this case fell within the limitation period.

dence claimed to be suppressed was not material, no hearing was required. Defendant Erb's contention is thus totally without merit.

Erb alleges that the Government deliberately suppressed evidence relating to whether Erb was present at the May, 1969, meeting at which Paul DeCoster, counsel for Xprint, explained that Erb and Van Aken could not purchase the low-priced Xprint stock previously promised to them if Baerwald & DeBoer were to underwrite the proposed public offering. Erb alleges that one of the participants at the meeting, Conrad Schmitt, who was not called as a witness at the trial, told the Government that he had never been at a meeting at which Erb was present when Xprint was discussed and another, Earl Deimund, who was a Government witness, told the Government that there was only a "thirty percent probability" that Erb was at the meeting.

Accepting Erb's allegations as true,* there was no "suppression" of evidence within the meaning of *Brady* v. *Maryland*, 373 U.S. 83 (1963). As this Court held in *United States* v. *Ruggiero*, 472 F.2d 599, 604-5 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973), where the defendant is "on notice of the essential facts required to enable him to take advantage of . . . exculpatory testimony", there is no suppression and the defendant is not entitled to any relief. See also *Giles* v. *Maryland*, 386 U.S. 66 (1967); *United States* v. *Stewart*, 513 F.2d 957, 960 (2d Cir. 1975); *United States* v. *Brawer*, 496 F.2d 703, 705 (2d Cir.), *cert. denied*, 419 U.S. 1051 (1974); *United States* v. *Tramunti*, 500 F.2d 1334, 1349 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974); *Williams*

* Although the Government has denied having such information in four separate affidavits by the individuals involved in the prosecution of the case, the Government recognizes that Erb's allegations must be accepted as true for purposes of this argument.

v. *United States*, 503 F.2d 995, 998 (2d Cir. 1974). See also *United States* v. *Natale*, 526 F.2d 1160 (2d Cir. 1975).

The same principle governs the argument put forth by Erb. As the District Court noted in its opinion (App. 95), Erb certainly knew whether he was present at the meeting in question and, based on the testimony of Paul DeCoster and Earl Deimund, he knew that Conrad Schmitt was a potential witness whom he could have called to affirm or deny Erb's presence at the meeting, just as he apparently sought Schmitt out to procure his affidavit immediately after trial. Erb chose not to do so.*

In addition, Earl Deimund was a witness for the Government and could have been closely cross-examined on his version of who was present. Indeed, as the District Court found, Erb's trial counsel "ably demonstrated that Deimund was not certain in his recollection that Erb had been present" (App. 95). Erb chose not to cross-examine further in this fashion, relying instead on establishing generally that Deimund was having "reasonable difficulty" recalling specific conversations and the identity of those present at the conferences in 1969 (Tr. 432-33).

Even assuming that the Government was aware of the allegedly exculpatory testimony to be had from Conrad Schmitt and Earl Deimund—and the Government reiterates that it was not—the Government was not required to make this known to Erb, because Erb, just like Stewart and Tramunti and Williams in their cases,

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* Furthermore, Schmitt's affidavit is at best ambiguous as to whether he explicitly told prosecutors that Erb was not present at the meeting. If Schmitt had not so informed the Government—and the affidavits filed by the Government indicate he did not—his testimony could not, of course, have been "suppressed".

was "on notice of the basic facts which could have produced this alleged exculpatory testimony." *United States* v. *Tramunti, supra.*

Because of Erb's knowledge of the basic facts, there was no need to conduct a hearing to resolve the disputed factual issue of whether the Government had exculpatory information. Whether the Government had the information is immaterial so long as the same information was available to the defendant. *United States* v. *Ruggiero, supra.* Having found that Erb was on notice of the essential facts (App. 95), the trial court was correct in denying the motion without a hearing.

In addition, after a careful review of the entire record, the trial court found that neither the alleged statement of Conrad Schmitt nor the alleged statement of Earl Deimund "could have been developed so as to have avoided a conviction" (App. 97). Thus, even if there had been an actual deliberate suppression, which there was not, the omitted evidence does not justify a new trial. Only "if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. . . . If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." *United States* v. *Agurs*, — U.S. —, No. 75-491, slip op. p. 15 (June 24, 1976). Furthermore, the degree of "fault" on the part of the prosecutor is immaterial. *Id.* at 13.*

As the trial court pointed out, the presence of Erb at the May 12 meeting was evidence only of Erb's motive for the crimes charged and was not evidence of the crimes themselves. The significance of the "omitted evidence"

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* In so holding, the Supreme Court by necessary implication overruled statements to the contrary in *United States* v. *Morrell*, 524 F.2d 550 (2d Cir. 1975) and other cases on which Erb heavily relies (App. Br. 40-41).

must be viewed in light of the significance of the evidence it would have allegedly contradicted. Erb's guilt centered on one essential fact, that Dr. Scott Skillern was his nominee. This was amply demonstrated by the testimony of Van Aken and of Skillern himself, whose testimony was indisputably corroborated by the tape recorded references to Skillern's ownership of only 20,000 shares and not the 50,000 set forth in the registration statement. In light of this overwhelming evidence of Erb's guilt, evidence of his motive is of relatively minor significance. Evidence contradicting the Government's evidence of his motive is, therefore, of equally minor significance.

Because the trial court's first-hand appraisal of the record was thorough and entirely reasonable and because, after such a thorough and reasonable appraisal, the trial judge remained convinced of Erb's guilt beyond a reasonable doubt, the Government's failure to inform Erb of the alleged statements of Schmitt and Deimund did not, in any event, deprive Erb of a fair trial. *United States* v. *Agurs*, *supra* at 16.

POINT IV

The tape recordings of conversations between the defendant Erb and his nominee were properly admitted into evidence and the Government's statement about them in summation was fair comment on the evidence.

The defendant Erb argues that the trial court committed reversible error in admitting into evidence tape recordings of conversations between Erb and Dr. Scott Skillern and argues that this error was compounded by the characterization of part of these conversations in the Government's summation as an attempt "to cheat on taxes" (Tr. 907) coupled with the Government's "sup-

pression" of Skillern's alleged denial that he contemplated evading taxes, which Erb argues should have been disclosed under *Brady* v. *Maryland*, *supra*. These contentions are without merit.

Erb argues that the conversations on the tapes, except for those portions directly relating to Xprint, "represented a classic example of inadmissible proof of other crimes" (App. Br. 26). On the contrary, these conversations represent a classic example of the admissibility of similar acts. The central factual issues in the case were whether Skillern was Erb's nominee for the purpose of holding 30,000 shares of Xprint stock and whether Erb knowingly and wilfully misrepresented the ownership of that stock to the SEC and the NASD. Apart from Skillern's testimony that he was Erb's nominee, nothing could be more relevant than the disclosure of the nature of the relationship between Erb and Skillern as revealed in the taped conversations. They reveal Skillern as an unsophisticated investor, naively accepting everything Erb suggested to him and inextricably bound to Erb because of the monumental losses sustained through prior transactions with Erb. The conversations reveal also that, having used Skillern as a nominee for the Xprint stock, Erb was planning to use Skillern again whenever the occasion arose. Finally, the conversations reveal that Erb was planning to use the tax benefits to be obtained from Skillern's previously incurred losses in order to reduce his own tax liability in the future.

Since the relationship between Erb and Skillern, and Erb's criminal intent in using Skillern as his nominee, were crucial issues at trial, those portions of the tapes were highly relevant. The taped conversations demonstrate that Erb's use of Skillern as a nominee for his Xprint stock was part of an overall plan or pattern of conduct and were, therefore, admissible as such. *United States* v. *Campanile*, 516 F.2d 288, 292 (2d Cir. 1975);

United States v. *Light*, 394 F.2d 908, 912 (2d Cir. 1968); Rule 404(b), Federal Rules of Evidence. In addition, proof that Erb intended to continue to use Skillern as his nominee for tax and other reasons demonstrates a lack of mistake or accident on Erb's part in causing the registration statement and other documents to be filed falsely listing Skillern as the owner of 50,000 shares of Xprint and is, therefore, admissible. *United States* v. *Wright*, 466 F.2d 1256, 1258 (2d Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); Rule 404(b), Federal Rules of Evidence.

Because the conversations were clearly relevant, they were properly admitted. Their probative value was great and, as the trial court found, evidence that Erb may having been attempting to evade taxes "was not so inflamatory or of such character that the likelihood of prejudice outweighed its probative value. *United States* v. *Williams*, 470 F.2d 915 (2d Cir. 1972); *United States* v. *Kaufman*, 453 F.2d 306 (2d Cir. 1971)" (App. 88).

Erb argues that the error in admitting the taped conversations was compounded by the characterization of portions of these conversations in the Government's summation as an attempt to cheat on taxes. As the trial court found, there was a foundation for the inference in the taped conversations (App. 88), and the statement in summation was therefore fair comment. Exen if tax evasion were, in the trial court's estimation, "unduly emphasized", any conceivable prejudice was surely cured by the court's immediate instruction to the jury to disregard the argument which was, as Erb's counsel himself characterizes it, a "one-liner" lost in a relatively lengthy summation.*

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* The court instructed the jury during the Government's summation as follows:

> "Ladies and gentlemen of the jury, nobody is on trial here for trying to cheat on their taxes. Confine your consideration of this case to the specific open charges in the indictment, and disregard the argument made." (Tr. 907).

Finally, Erb argues that the Government improperly suppressed Skillern's denial of any intent to participate in a tax evasion scheme. Even assuming for the purpose of this argument that Skillern made such a denial, the failure to disclose that fact to the defendant Erb did not deprive him of a fair trial. In the first place, evidence of Skillern's intent or lack thereof to evade taxes was totally irrelevant to the issue of Erb's intent to do so with Skillern as his innocent accomplice. In any event, it cannot be argued that this allegedly omitted evidence was such that it would have created a reasonable doubt of Erb's guilt. *United States* v. *Agurs, supra.* Having successfully persuaded the trial court to instruct the jury to ignore anything to do with allegations of a scheme to evade taxes, Erb's claim that he was improperly deprived of an opportunity to combat those allegations becomes absurd.

POINT V

The court's charge to the jury did not create reversible error.

DeBoer argues that the court's instruction to the jury were erroneous in three respects. He cites as error A) the court's failure to instruct the jury that "mere knowledge" is insufficient; B) the court's inclusion of the "natural and probable consequences" charge; and C) the court's inclusion of the "no inference from failure to call cumulative witnesses" charge. Erb also argues that the last charge created reversible error as to him.

A) "Mere knowledge".

DeBoer argues that, because this was a close case, the failure specifically to instruct the jury that mere knowledge on DeBoer's part was insufficient was reversi-

ble error. DeBoer relies on the holdings of this Court in *United States* v. *Terrell*, 474 F.2d 872, 876 (2d Cir. 1973) and *United States* v. *Garguilo*, 310 F.2d 249, 254 (2d Cir. 1962). This argument is without merit. This was not the type of "close case" to which the holdings of *Garguilo* and *Terrell* apply, and, in any event, the District Court's charge sufficiently charged that actual participation by DeBoer was necessary.

In *Garguilo*, the defendant Macchia was convicted on evidence that he had accompanied his co-defendant Garguilo on a number of occasions while Garguilo was engaged in a counterfeit scheme. This Court observed that "on every occasion that was the subject of testimony, Garguilo was the actor, often he was alone . . . any inference that Macchia had some role beyond that of a companion rested on . . . rather equivocal evidence . . . and on the repetitive instances of his presence. . . ." *United States* v. *Garguilo*, *supra* at 253-54. The Court concluded that the evidence against Macchia "passed the test of sufficiency . . . only by a hair's breadth" which required the Court "to review the charge with what, in a less doubtful case, would be undue meticulousness." *Id.* The Court reversed Macchia's conviction but affirmed Garguilo's noting that "in the usual case we should not think of finding reversible error in such a charge." *Id.*

Similarly, in *Terrell* this Court affirmed the convictions of two of three defendants without respect to the mere knowledge charge and reversed the conviction of the third defendant, McDonald, who, the evidence showed, merely drove the car in which the other two defendants sold narcotics. This Court held that "for the very reasons stated in *Garguilo*," the third defendant was entitled to the mere knowledge instruction, where the evidence of participation was "not inadequate but not overwhelming." *United States* v. *Terrell*, *supra* at 876.

Initially, it should be noted that the charge given in this case satisfied the concern voiced in *Garguilo*. In that case, this Court noted that "simply by emphasis" the District Court "may have led the jury to believe that a finding of presence and knowledge . . . was enough for conviction." In particular, the trial court failed to charge that the defendant must be "a participant rather than merely a knowing spectator." *Id.* In this case, by contrast, the District Court specifically charged--in language not used in *Garguilo*, *supra* at 254 n. 1—that the jury must find that "a defendant in some way associates himself with the criminal venture, that he participates in it, as in something he wishes to bring about, or needs, that he seeks by his action to make the criminal efforts of the person who is being aided and abetted succeed" (Tr. 1043). This charge, both in its specific content and its emphasis was perfectly proper in the context of this case.

Furthermore, the case against DeBoer was much stronger than the case against Macchia or McDonald, and since those cases were explicitly limited to situations where the evidence was barely sufficient, they are inapposite here. The evidence demonstrated that DeBoer was much more than a passive spectator. Rather, the evidence showed that DeBoer was actually the architect of the entire scheme. He was the one who first pointed out the need to use nominees in order to deceive the SEC and the NASD, and he instructed his partners to have his stock issued in the name of James Lovelett, DeBoer's long time nominee. Furthermore, he stood to gain at least equally with the others in the event that the sale of stock was completed. It was thus inconceivable that a jury could have found knowledge but not participation.

The case against DeBoer was thus at least as strong as that in *United States* v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975), a securities fraud case involving the ex-

change of stock for fur coats. The defendant Finkelstein claimed that the failure to give the mere knowledge instruction was error, citing *Garguilo*. This Count distinguished Finkelstein's case from *Garguilo* on its facts and observed that "while it is unclear whether Finkelstein received any of the fur coats, . . . it was Finkelstein who first conceived the exchange." *Id.* at 526. DeBoer was no more entitled to the mere knowledge instruction than was Finkelstein whose conviction was affirmed. See also *McDonnell* v. *United States*, 472 F.2d 1153 (8th Cir. 1973); *United States* v. *Milby*, 400 F.2d 702 (6th Cir. 1968).

B) "Natural and probable consequences."

DeBoer also argues that the court's instruction to the jury that "a person is presumed to intend the natural and probable or ordinary consequences of his acts" (App. 60) was error. DeBoer relies on *United States* v. *Bertolotti*, 529 F.2d 149 (2d Cir. 1975) and *United States* v. *Barash*, 365 F.2d 395 (2d Cir. 1966). Neither of these cases is applicable to the instant case and the argument is without merit.

Bertolotti involved a conspiracy to possess and distribute narcotics. *Barash* involved bribery. In both cases this Court emphasized that the natural and probable consequences instruction was erroneous in a case where the Government is required to prove a specific intent on the part of the defendant to violate the law. In such cases the instruction complained of has the effect of erroneously shifting the burden of proof on this essential element to the defendant. *United States* v. *Barash*, *supra* at 402.

In a case such as this, however, involving violation of the securities law, specific intent to violate the law is

not an essential element of the crime charged. *United States* v. *Schwartz*, 464 F.2d 499, 509 (2d Cir. 1972); *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 855 (2d Cir. 1968). Although the natural and probable consequences instruction is erroneous in a case in which specific intent is an element, the instruction is proper in a case, such as this, in which the crime involved requires only a general intent. *United States* v. *Bristol*, 473 F.2d 439, 443-44 (5th Cir. 1973). *United States* v. *Releford*, 352 F.2d 36, 40 (6th Cir.), *cert. denied*, 382 U.S. 984 (1965).

In addition, although the Government was not required to prove specific intent, it did so prove. Van Aken's testimony about the April 22 meeting demonstrated that, by DeBoer's own statements, he had a specific intent to defraud the SEC and the NASD. "Thus, the government's case did not rest upon mere implications of evil motive, but was supported by affirmative objective evidence . . . ." *United States* v. *Wilkinson*, 460 F.2d 725, 733 (5th Cir. 1972). In such an instance, the natural and probable consequences instruction is not erroneous. *United States* v. *Durham*, 512 F.2d 1231, 1288-89 (5th Cir. 1975).

Finally, it should be noted that DeBoer did not object to the natural and probable consequences instruction at the trial. Clearly it was not "plain error" for the court to give the instruction. Rule 30, Fed. Rules Crim. Proc.; *United States* v. *Scandifiia*, *supra*, at 248; *United States* v. *Umans*, 368 F.2d 725, 728 (2d Cir. 1966), *cert. dismissed*, 389 U.S. 80 (1967).

C) "Failure to call a witness."

Both Erb and DeBoer argue that the trial court committed reversible error in its instruction to the jury regarding the failure to call Donald Sedgwick as a wit-

ness.* They premise their argument on the unproven allegation that, if Sedgwick had testified, he would have contradicted Van Aken on the collateral issue of whether Sedgwick was Van Aken's nominee. The Government concedes that Sedgwick's unsworn, out of court statements support the allegation, but there was nothing on the record of this case before the jury from which the jury needed to draw any inference at all regarding Sedgwick. Indeed, the District Court was entirely correct in noting, in response to defense counsel's request for a correction of this element of the charge, that "He's cumulative in that he was there at the same time and place and participated in the same conversation that other witnesses testified to. His version can be different and he can still be cumulative." (A. 63). The alternative solution of defining "cumulative" according to the anticipated testimony of an uncalled witness would amount, in essence, to encouraging the jury implicitly to consider unsworn evidence not properly before them.

Furthermore, the court instructed the jury that "testimony concerning Donald Sedgwick [was] received only against the defendant Erb" (Tr. 1037), and that "if you

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* The court's instruction on this point was as follows:

"Now, there is no duty on the part of the government to call in other or additional witnesses whose testimony would merely be cumulative. You are to decide this case on the evidence which is before you or upon the absence evidence, but not upon evidence which might have been brought before you. Specifically, the government had no duty to call Donald Sedgwick as a witness. As I explained to you earlier, defendants have no duty to call any witnesses or bring any evidence. However, Donald Sedgwick is equally available to both sides, and could be subpoenaed by the government or by any defendant if either of them thought they should do so and, accordingly, no inference follows adverse to anyone from the failure to call him as a witness and no such inference adverse to any side in this litigation follows from a failure to bring in testimony which the jury would regard as merely cumulative" (App. 56).

find that the stock actually was purchased as an investment for the benefit of Lovelett, then the statement in the [registration statement] with respect to Lovelett being an owner and seller of the stock would be true and accordingly DeBoer must be acquitted . . . . " (Tr. 1058). Thus, despite the strong argument by DeBoer's counsel in summation, the evidence relating to Sedgwick was immaterial as to him. Any argument that this point was material on the issue of Van Aken's credibility pales in light of the intensive attack mounted on Van Aken's credibility through his prior convictions, his deal with the Government and his own admission that he was an accomplice in this case and was not indicted. *United States* v. *Pacelli*, 521 F.2d 135, 137 (2d Cir. 1975); *United States* v. *Rosner*, 516 F.2d 269, 273-74 (2d Cir. 1975).

Although the evidence relating to Sedgwick was at least minimally material to the defendant Erb, his argument that the charge requires reversal is equally unpersuasive. The most telling facts are that Erb neither called Sedgwick as a witness, although he was concededly available, nor did he in summation urge the jury to draw any inference from the Government's failure to call Sedgwick. This strongly suggests that Erb did not consider Sedgwick's testimony material. In *United States* v. *Llamas*, 280 F.2d 392, 394-95 (2d Cir. 1960), relied on by the defendants, the court found no reversible error in a charge that an adverse inference can be drawn only if the testimony of an uncalled witness would be superior to testimony of witnesses who had been called, noting that the defendant had neither called for the witness to be produced nor commented on his absence in summation.

Similarly, in *United States* v. *Miranda*, 526 F.2d 1319, 1330-31 (2d Cir. 1975), the court found no error in the cumulative witness instruction where "there was

no showing that either [uncalled witness] were material witnesses. . . ." *Id.* Although the evidence relating to Sedgwick was of some materiality, it is apparent that Erb did not consider it significant at the trial. Even if the jury had chosen to believe that Sedgwick was not Van Aken's nominee, Erb would not have benefitted because of the overwhelming evidence that Skillern was Erb's nominee, the issue on which Erb chose to do battle at the trial.

Finally, *United States* v. *Dixon*, — F.2d —, Dkt. No. 75-1317, slip op. 2615, 2623-24 (2d Cir. March 12, 1976), upon which Erb and DeBoer rely, hardly helps them. In that case a charge cautioning against adverse inference by either side was approved, even though defense counsel claimed that a certain witness would in fact provide exculpatory material.

Erb's argument on this appeal is clearly an afterthought, and the court should, in the words of the Supreme Court in *Glasser* v. *United States*, 315 U.S. 60, 83 (1942), "guard against the magnification on appeal of instances which were of little importance in their setting."

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Ephraim Saitt being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 19th day of July, 1976 he served a copy of the within Briefs by placing the same in a properly postpaid franked envelope addressed:

GARY P. NAFTALIS, ESQ.
Orans, Elsen & Polstein
One Rockefeller Plaza
New York, N.Y. 10020

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing within the United States Courthouse Annex, One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Ephraim Saitt

Sworn to before me this
19th day of July 1976

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-4578156
Qualified in Kings County
Commission Expires March 30, 1977

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

EPHRAIM SAVITT being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 19th day of July, 1976 he served a copy of the within Brief by placing the same in a properly postpaid franked envelope addressed:

Edward M. Shaw
522 Fifth Avenue
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And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing within the United States Courthouse Annex, One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Ephraim Savitt

Sworn to before me this
19th day of July 1976

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977